No. 20811

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JACK GOODMAN, PARAMOUNT ICE CREAM CORP. and FRIGID PROCESS CO.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellees.

APPELLANTS' OPENING BRIEF

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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JURISDICTIONAL STATEMENT

On November 8, 1965 a complaint was filed in the United States District Court for the Southern District of California, Central Division wherein appellants, relying on the Fourth, Fifth and Sixth Amendments to the Constitution of the United States and pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure and 28 U.S.C., Section 1331(a), sought the return of property or copies thereof and the suppression for use as evidence of various books, records and memoranda which, it was alleged, were obtained by appellees as the result of an unlawful search and seizure conducted in and around

Los Angeles, California, within the jurisdiction of said court. (C.T.2)[1] Hearings were held on December 6, 1965, December 15, 1965, December 16, 1965 and January 6, 1966. On February 8, 1966 a final judgment was entered by the Court which adjudged that appellants' rights under the Fourth, Fifth and Sixth Amendments to the Constitution had not been violated and appellants' complaint was dismis (C.T. 256.) On February 11, 1966, appellants filed a Notice of Appeal (C.T. 267). This Court has jurisdiction to review the final judgment of the District Court under Title 28, United States Code, sections 1291 and 1294.

STATEMENT OF THE CASE

In these proceedings, appellants are seeking the return of property, or copies thereof, which it is contended was obtained from them in violation of the Fourth, Fifth and Sixth Amendments to the Constitution of the United States.

Special Agent Frederick Nielsen was formally assigned to conduct a criminal tax investigation of "Jim Pinkerton" on March 2, 1964. (Exhibit 8.) On April 7

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[1]Throughout this brief, references to the Clerk's Transcript will be designated by "C.T.", and references to the Reporter's Transcript will be designated by 'R.T."

1964, Mr. Nielsen, accompanied by Special Agent David Stutz, first contacted Mr. Pinkerton. They did not advise Mr. Pinkerton that they were criminal investigators or that they were conducting an investigation of a criminal nature because he did not ask. (R.T. 20-21.) Later the same day the agents went to Paramount Ice Cream Corp. (hereinafter "Paramount"). They briefly identified themselves to Ruth Myshrall, the bookkeeper, and told her they were investigating Mr. Pinkerton and Paramount and that Mr. Pinkerton said that the records of Paramount were available for their examination. (R.T.21-22.

They returned the next day and displayed their credentials to Mr. Goodman who had acquired control of Paramount from Mr. Pinkerton in March, 1962. (R.T. 416, 455 The District Court found that Mr. Goodman asked the difference between a special agent and a revenue agent even thought they were both special agents and their identification commissions were identical and that Mr. Nielsen explained the difference. (C.T. 249.) Mr. Nielsen testified that he explained that:

> ". . .an Internal Revenue Agent conducts civil audits; a Special Agent conducts an investigation to determine whether any of the Internal Revenue laws have been violated, whether there has been any attempt to evade or defeat the payment of any income taxes."

(R.T. 24.)

No statement, however, was made that the agents were conducting an investigation of a criminal nature. (R.T. 417-418

Mr. Goodman testified that although Paramount an Frigid Process Co. (hereinafter "Frigid") had been once audited in the past, he never had any dealings with any of the agents conducting those audits. He denied asking Mr. Nielsen and Mr. Stutz the difference between special agent and revenue agents. He testified that the first time he learned that there was a difference between revenue agents and special agents was during the first week of January, 1965. (R.T. 298-299.)

On April 8, 1964 Mr. Nielsen and Mr. Stutz were shown various records of Paramount for the years 1959 through 1962. According to Mrs. Myshrall, the agents wanted to see Paramount's books only up to March of 1962; the time when Mr. Pinkerton sold his interest in Paramount to Mr. Goodman. (R.T. 210, 211, 212.) Mr. Nielsen testifi that Mr. Goodman was not advised of any constitutional rights at this meeting because he was not then the subject of an investigation. (R.T. 28, 30.)

The agents returned to Paramount on April 9, 196 and April 21, 1964, when they continued to examine and cop records of Paramount. On April 21, 1964, the agents were permitted to take with them books and records of Paramount all of which, except for one, related to the period up to

and including 1962. (Exhibit 1.) The Court found that certain books beyond 1962 were taken. (C.T. 250.)

On October 23, 1964, Mr. Nielsen and Mr. Loebig contacted Mr. Charles Fisher, the accountant for Paramount, Mr. Pinkerton and Mr. Goodman. (R.T. 80.) On the document receipt issued to Mr. Fisher (Exhibit 5), Mr. Nielsen's title of "Special Agent" was omitted.

Prior to November 6, 1964, Mr. Nielsen discussed Mr. Goodman with his group supervisor and obtained his approval to requisition Mr. Goodman's personal income tax returns for his taxable years 1959 through 1963 (Exhibit 9) These returns were requisitioned on November 6, 1964 and November 10, 1964, as part of an "official investigation". Mr. Nielsen stated that he requisitioned these returns to determine whether Mr. Goodman had reported as income a particular commission which had been paid to him according to Paramount's books and records. (R.T. 55.) Mr. Nielsen testified that Mr. Goodman reported this item of income on his return. (R.T. 62.)

On December 18, 1964, Mr. Nielsen returned to Paramount, this time accompanied by Internal Revenue Agent Keith Loebig. The purpose of the agents returning was to examine the books and records of Paramount for the period subsequent to March, 1962, the approximate time when Mr. Goodman bought out the interest of Mr. Pinkerton in Paramount. (R.T. 85, 87, 210, 211, 212,

214.) On this visit, the agents had in their possession Mr. Goodman's personal returns, but these returns were not shown to him on this date. (R.T. 446.) Mr. Goodman was not advised of any of his constitutional rights onDecember 18, 1964. (R.T. 62, 450.) The agents knew that the books and records which they examined and obtained on December 18, 1964, pertained to a period when Mr. Goodman was president of Paramount. (R.T. 455.) On December 18, 1964, they obtained Paramount's post-1962 records and issued a document receipt which indicates that the material was submitted in re "Jim Pinkerton". (Exhibit 2.)

After leaving Paramount on December 18, 1964, at approximately 3:00 or 4:00 P.M., Mr. Nielsen testified he then returned to his office where he discussed several of his cases with his supervisor. He also discussed Paramount, Mr. Pinkerton and Mr. Goodman, and it was decided in this conversation that Mr. Goodman would become the subject of an investigation. (R.T. 54, 63, 64.) (Exhibit 8.)

The agents returned to Paramount on December 21, 1964. According to Mr. Nielsen's testimony, he told Mr. Goodman that in the past their conversations pertained to Mr. Pinkerton and Paramount, but that now they were investigating his personal returns. Mr. Nielsen testified that his advice to Mr. Goodman was as follows: that he was

a Special Agent with the Intelligence Division, United Stat Treasury Department; that Mr. Goodman was not required to make any statement that may tend to incriminate him; that any statement he made could be used against him; and that he had the right to legal counsel. (R.T. 68-69.) The agents testified that at no time, however, did they tell Mr. Goodman that they were conducting a criminal investigation and at no time was the word "crime" or any other wor of similar import used. (R.T. 68, 450, 454.) Mr. Nielsen testified that this meeting took approximately one hour. (R.T. 69.)

Mr. Goodman categorically denied that the agents advised him of any of his constitutional rights or that he was the subject of an investigation. (R.T. 305-306.) On this day the agents had Mr. Goodman identify his personal returns and they asked him to produce his personal cancelled checks. (R.T. 69, 73, 74.) Mr. Goodman testifie that he believed the agents' request for his cancelled checks was part of their continuing investigation of Mr. Pinkerton, since he had been doing business with Mr. Pinkerton for 27 years. (R.T. 306.) Mrs. Myshrall testified that Mr. Goodman told her after this meeting that the agents wanted to see his cancelled checks pertaining to dealings with himself and Mr. Pinkerton. (R.T. 217.) According to Mr. Goodman and Mrs. Myshrall, the agents remained with Mr. Goodman for no more than five minutes.

(R.T. 213, 307.) The Court's findings are substantially in accord with Mr. Nielsen's testimony. (C.T. 251.)

After this meeting with Mr. Goodman, the agents remained at Paramount for the balance of December 21, 1964 microfilming records. (R.T. 60, 70.) Upon leaving Paramount this day, the agents took with them various other records of Paramount for which they issued a document receipt. Even though they allegedly told Mr. Goodman that they were now investigating him, and they took records relating to the period after 1962, the document receipt states that the records were submitted in re "James Pinkerton". The records taken were "a total of ten (10) brown, light, books containing duplicate copies of deposit tickets for Paramount Ice Cream Co. from January 23, 1961 through June 2, 1964." (Exhibit 3.)

On December 23, 1964, the agents returned to Paramount at which time they obtained Mr. Goodman's cancell checks. (Exhibit 4.) Mr. Nielsen testified that he did not warn Mr. Goodman of any of his constitutional rights other than telling him "that he was not obligated to turn these checks over". (R.T. 76, 78, 460.) The District Court so found (C.T. 251.) Mr. Goodman categorically denied that he was told that he could refuse to turn over his checks to the government. (R.T. 308.)

Mr. Nielsen and Mr. Loebig first went to Frigid on December 30, 1964 and returned on January 4, 5, 6 and 7,

1965 during which they examined Frigid's books and record (R.T. 97, 98.)

On January 8, 1965, a meeting took place betwee Mr. Nielsen, Mr. Loebig and Mr. Goodman. When Mr. Nielse was asked if he told Mr. Goodman that the investigation was of a criminal nature, he stated that the only explanation he gave Mr. Goodman about the nature of the investigation was that "I was investigating his own personal returns and that's all the further explanation I made". (R.T. 102.) There was a sharp conflict in the testimony concerning the details of this meeting. The Court found that the agents' version of the meeting was correct. (C.T. 252.)

Mr. Loebig testified that the first time in the investigation that Mr. Nielsen had ever used the word "criminal" was during this meeting when Mr. Nielsen stated that he felt the criminal aspects of the case had priority over the civil aspects of the case. (R.T. 453.) Mr. Loebig further stated that Mr. Goodman had never been told this prior to January 8, 1965. (R.T. 454.) He testified that prior to this meeting on January 8, 1965, he had no idea whether Mr. Goodman understood that he and Mr. Nielsen were conducting a criminal investigation. (R.T. 443.)

Mr. Loebig testified that he took notes of the meetings on December 21, 1964, January 8, 1965, and Janua

12, 1965. He did not take notes of meetings held on December 18, 1964 and December 23, 1964. (R.T. 457, 461. Both Mr. Nielsen and Mr. Loebig testified that they refreshed their recollections of the meetings with Mr. Goodman by examining their notes or memoranda of these meetings. (R.T. 387, 456.) None of these notes or memoranda were ever submitted to the Court. Mr. Loebi further testified that the primary concern of the investigation that he and Mr. Nielsen were conducting was to "determine whether there have been any criminal violation of the Internal Revenue laws". (R.T. 442.)

In the course of the District Court proceedings subpoenas duces tecum were served upon various appellees. (C.T. 179-87.) On January 6, 1966, appellees' motion to quash these subpoenas was granted. (R.T. 400-01.) On January 27, 1966, an Order for Findings of Fact, Conclusions of Law, and Judgment was entered by the Court wherein it was held that appellants' rights under the Fourth, Fifth and Sixth Amendments had not been violated. (C.T. 246.) Thereafter, proposed Findings of Fact, Conclusions of Law, and Judgment were lodged by appellees on February 2, 1966 and were signed by the District Court and entered on February 8, 1966. (C.T. 248 258.)

* * * * *

SPECIFICATIONS OF ERROR RELIED UPON

1. The District Court erred in granting appellees' motion to quash appellants' Subpoenas Duces Tecum, dated December 14, 1965.

2. The District Court erred in making Findings of Fact VIII, X, XI, XII, XIII, XIV, XVII, XIX, XXII, and XXIII as set forth below:

A. Finding of Fact VIII is erroneous in that Mr. Goodman did not ask the difference between a special agent and an Internal Revenue agent and further because Mr. Nielsen did not explain the difference.

B. Finding of Fact X is erroneous because only one book beyond 1962 was taken by the agents.

C. Finding of Fact XI is erroneous because Mr Nielsen wanted to examine the post-1962 Paramount books and records as part of an investigation of appellants.

D. Finding of Fact XII is erroneous because Mr. Nielsen was assigned to investigate Mr. Goodman prior to his visit to Paramount on December 18, 1964.

E. Finding of Fact XIII is erroneous because the investigation of appellants began on December 18, 1964; Mr. Goodman was not told of his constitutional rights in a meaningful fashion; Mr. Goodman was not told that he was not obligated to turn over his personal cancelled checks; Mr. Goodman did not voluntarily agree to make available the books of Frigid Process Co.; Mr. Nielsen did not ask

Mr. Goodman for permission to examine additional records of Paramount as part of the Pinkerton-Paramount investigation; Mr. Nielsen did not take books of Paramount with him on this day as part of the Pinkerton-Paramount investigation.

F. Finding of Fact XIV is erroneous because on December 23, 1964 Mr. Nielsen did not tell Mr. Goodman that he did not have to turn over his personal cancelled checks.

G. Findings of Fact XVII is erroneous because on January 8, 1965 Mr. Goodman did not invoke his right against self-incrimination; Mr. Nielsen did shout; Mr. Nielsen did promise leniency; Mr. Nielsen did accuse Mr. Goodman of lying; Mr. Goodman did not initiate a discussion with the agents thereafter on that day.

H. Finding of Fact XIX is erroneous because on January 12, 1965 the agents did not give a receipt for certain books and records of Frigid which were taken on that day.

I. Finding of Fact XXII is erroneous in its entirety.

J. Finding of Fact XXIII is erroneous in its entirety.

K. Conclusions of law 2 through 5 are erroneous in their entirety.

* * * * * *

SUMMARY OF ARGUMENT

During the trial, appellants sought to obtain, by the use of subpoenas duces tecum, various material which they felt was critical to the presentation of their case. The District Court, without stating any reasons, granted appellees' motion to quash said subpoenas. Since appellants were entitled to said material and since said material was critical to appellants' case, the action of the District Court denied appellants due process of law.

During the course of a criminal income tax investigation of appellants, which originally began as a criminal tax investigation of a third party, various books, records and memoranda of appellants were obtained and copied by appellees for use in future criminal proceedings. Appellants contend that the criminal investigators obtained such evidence in violation of their rights under the Fourth, Fifth and Sixth Amendments. Accordingly, all material so obtained must be suppressed as evidence in any future proceedings and all copies thereof must be returned to appellants.

ARGUMENT

I.

THE TRIAL COURT ERRED IN GRANTING APPELLEES' MOTION TO QUASH THE SUBPOENAS DUCES TECUM

A. A Subpoena Duces Tecum Will Only Be Quashed If It Is Oppressive and Unreasonable.

Under Rule 45(b) of the Federal Rules of Civi Procedure, a subpoena may be quashed if it is both unreason able and oppressive. Fed. R. Civ. P. 45(b).

In the Court below, appellees argued that the scope of appellants' original subpoenas duces tecum (C.T. 259-266) was too broad and, consequently, unreasonable and oppressive. Appellants thereupon modified the subpoenas which had been served on Frederick Nielsen, Keith M. Loebig and Robert H. Lund, and significantly limited the material which appellants sought to have produced. (C.T. 179-87). The modified subpoenas sought the following information:

Item 1. The government agents' notes and reports of interviews or discussions with Jack Goodman and the bookkeepers of Paramount and Frigid for the period April 7, 1964 through June 10, 1965;

Item 2. The notes and reports of conferences or discussions between the government agents and their supe visors pertaining to the commencement, progress and conduct of the investigation of Pinkerton, Goodman, Paramount and Frigid;

Item 3. The Internal Revenue Service manuals pertaining to the commencement and conduct of fraud investigations, including the procedural steps required, as well as requirements pertaining to the admonition by agents to persons being investigated of their constitutional rights;

Item 4. Any policy memoranda and administrative rulings of the San Francisco Region and the Los Angeles District Director's Office pertaining to paragraph 3

Item 5. The work diaries of the two government agents involved for the period March 2, 1964 through January 14, 1965; and

Item 6. The work attendance records of the two government agents involved for the period December 18, 1964 through January 14, 1965. (C.T. 179-187).

B. The Subpoenas Duces Tecum Are Not Oppressive.

The request for the documents and manuals in the modified subpoenas is, on its face, not oppressive since it does not seek the production of any books, ledgers, or other bulky or weighty material. The request merely seeks notes, memoranda, reports and manuals. Appellees have failed to demonstrate that the subpoenas constitute an oppressive burden. Pursuant to Rule 45(b), appellants, at the trial, offered to pay the reasonable cost of producing such items. (R.T. 15).

C. The Subpoenas Duces Tecum Are Not Unreasonable

A careful examination of the particular papers

documents, and manuals sought and an examination of the arguments urged by appellants, indicates that the material sought was not only far from being unreasonable, but was relevant and critical to the establishment of appellants' case.

Appellants' position, both at the Trial Court and upon this appeal, is, to a great extent, founded upon the following two arguments:

1. That appellants were the "accuseds" in a criminal investigation and that they should have been timely advised of this fact and of certain constitutional rights; and

2. That the investigating agents intentionally deceived and tricked appellants with respect to the subject and nature of the investigation and of their constitutional rights.

An explanation of the materiality of the documents sought is as follows:

Item 1. The notes, memoranda and reports of interviews would materially assist appellants in refuting the contention of the government agents that an admonition of constitutional rights was in fact given. In seeking such notes, appellants are not concerned with the substantive tax matter contained therein. Although there was testimony from the agents that notes were taken, they were never produced.

Item 2. In seeking the notes, memoranda and reports of conferences and discussions between the various investigating agents and their supervisors and superiors, appellants sought the files pertaining to the status (rather than the substantive content) of the two investigations involved, both of which were greatly intertwined and interrelated. It is crucial that appellants be permitted to demonstrate the exact time when the investigation first included Mr. Goodman. Such material will also assist appellants in proving that fraud and deceit was practiced by the government agents since appellants believe that such notes and reports will demonstrate that Mr. Goodman was the subject of a criminal investigation prior to December 21, 1964.

Items 3 and 4: In seeking Internal Revenue Service manuals and policy memoranda or administrative rulings, appellants believe that these documents will be of material assistance in demonstrating that this investigation which was commenced by one or more special agents, was a criminal investigation from its inception and was never concerned with anyone's civil tax liabilities. Additionally the instructions to special agents contained in such manuals will lend support to testimony on appellants' behalf that no warning of constitutional rights was given.

Items 5 and 6: The work diaries and work attendance records of the investigating agents were sought

for impeachment purposes. The government agents testified that a meeting was held during the late afternoon of December 18, 1964 with Mr. Nielsen's group chief, at which meeting the decision to begin an investigation of Mr. Goodman was reached. (Exhibit 8). Appellants contend that the decision to make Mr. Goodman the subject of a criminal investigation occurred sometime prior to December 18, 1964 and that the case assignment sheet (dated December 18, 1964) (Exhibit 8) was actually prepared prior to the interview of Mr. Goodman on this day. The production of the work diaries and work attendance records of the investigating agents hopefully will enable appellants to demonstrate this.

D. There Is Substantial Authority For The Production Of The Documents Sought.

There is substantial authority to support the production of the material requested in appellants' subpoenas duces tecum. In a most recent case, United State v. Gower, _____F. Supp._____, 65-2 USTC ¶15,655 (M.D. Pa. 1965), the court ordered the Internal Revenue Service to produce for the taxpayer's examination not only all of the evidence obtained during the investigation but also all of the Service's inter-office reports, memoranda, and Internal Revenue manuals. See also United States v. Lipshitz, 150 F. Supp. 321 (D.C.N.Y. 1957).

In United States v. Foley, 283 F.2d 582

(2d Cir. 1960), the Second Circuit approved the production of reports, memoranda and letters within the Internal Revenue Service concerning the taxpayers involved so that the court could determine whether they contained material to which the taxpayers were entitled.

In United States v. San Antonio Portland Cement Co., 33 F.R.D. 513 (W.D. Tex. 1963), the government was ordered to produce for inspection certain intra-office reports, memoranda and other statements and communications of the Internal Revenue Service, and the government's argument that the documents had executive or attorney-client privilege status was brushed aside.

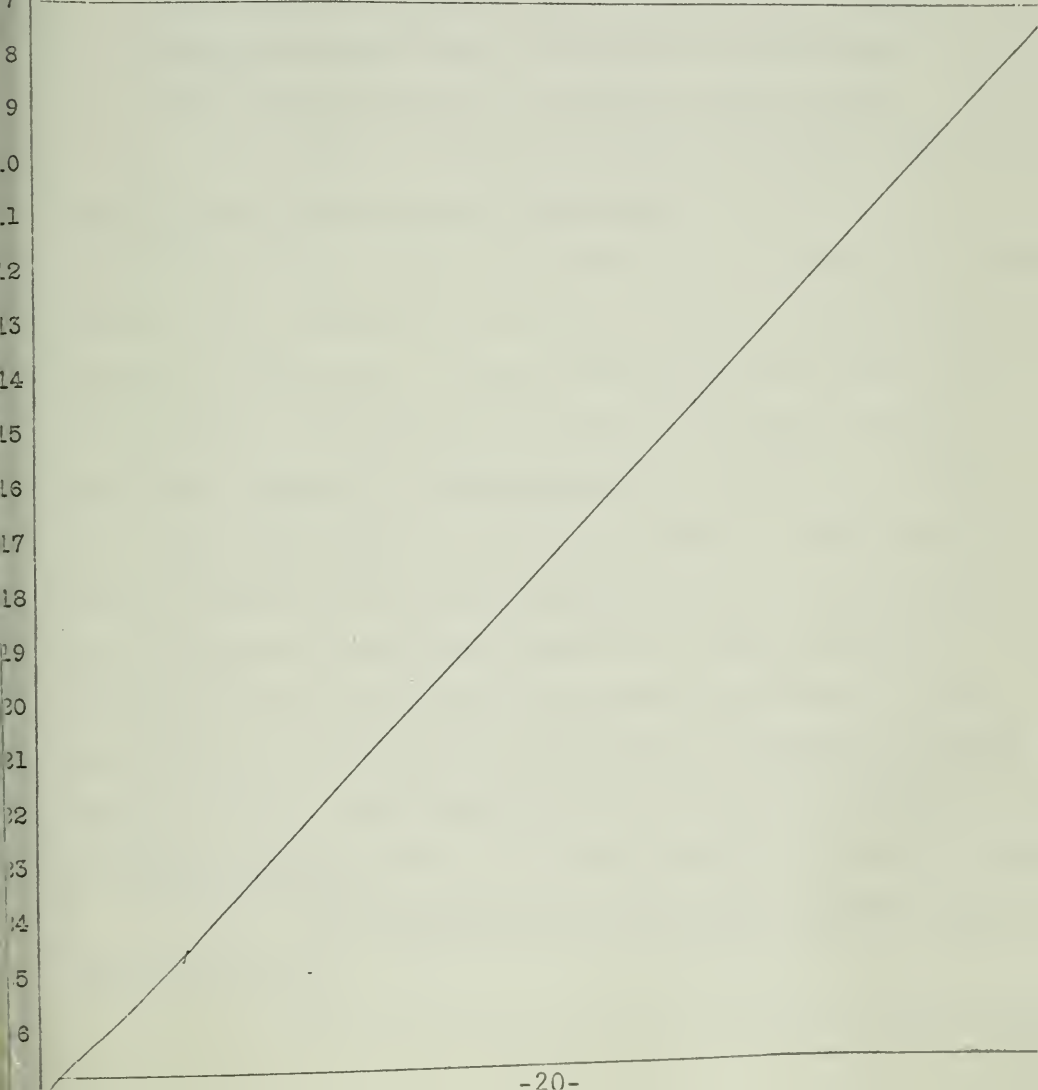
E. The Appellees Had The Burden To Establish The Oppressive Or Unreasonable Nature Of The Subpoenas Duces Tecum.

This Circuit has previously held that the burden of quashing a subpoena on the grounds that it is oppressive and unreasonable is upon the person to whom the subpoenas are directed. Sullivan v. Dickson, 283 F.2d 725 (9th Cir. 1960).

F. Appellants Have Been Denied Due Process Of Law

At the trial, appellants had in their possession very little documentary evidence with which to corroborate their testimony. Appellants maintain that all of the documents sought in the subpoenas duces tecum would have been instrumental indemonstrating the veracity of

appellants' testimony and falsity of such of appellees' testimony. The District Court failed to state the grounds for quashing the subpoenas and failed to make a finding that they were unreasonable or oppressive. Since appellants were denied a material and significant method of establishing their case, they were denied due process of law.



Appellants, therefore, request that this case be remanded to the District Court with a direction that all of the material sought in the subpoenas duces tecum be presented for appellants' examination and that, if warranted, additional evidence be received.

II.

THE GOVERNMENT AGENTS INTENTIONALLY DECEIVED AND MISLED APPELLANTS INTO BELIEVING THAT THEY WERE NOT THE SUBJECTS OF A CRIMINAL INVESTIGATION

A. The Use Of Fraud Or Deceit Nullifies The Admissibility Of Evidence So Obtained.

This Court has previously recognized that the presence of "affirmative fraud" on the part of government agents is sufficient to cause the suppression of any and all evidence, statements and books and records, thereby obtained. Kohatsu v. United States, ____F.2d_____ (9th Cir. 1965) cert. den. ___U.S. ____ (1966). That fraud or deceit violates the Fourth Amendment to the Constitution and constitutes sufficient grounds for suppression of evidence thereby obtained is not a new doctrine. It was originally stated by the Supreme Court in Gouled v. United States, 255 U.S. 298 (1920), and was recently affirmed in Miranda v. Arizona, 34 U.S.L. Week 4521 (U.S. June 13, 1966)

B. This Investigation Originally Pertained To A Third Party Only.

Since this investigation originally commenced

as an investigation of James Pinkerton (R.T. 9, 17) and, thereafter shifted to include Mr. Goodman (R.T. 67-68), manifest confusion as to the nature and subject of the various investigations was inherent. Since Mr. Goodman was president of Paramount during the time both of these investigations were conducted, this confusion was obvious to the investigation agents. It was difficult, if not impossible, for an outsider to ascertain the exact function of the government agents on any given day. In fact, the subject of the investigation on any given day was likewise obscure.

C. The Inherent Confusion Was Purposely Compounded By The Agents.

The government agents compounded this confusion by failing to disclose, in any meaningful fashion, the subjects and nature of the various investigations. By referring to themselves merely as "special agents" or "internal revenue agents" (R.T. 24, 38, 67), and by purposely explaining their function in a legalistic rather than a meaningful fashion, they deliberately attempted to capitalize upon this confusion and uncertainty.

Appellants' confusion might have been eliminated had his accountant, Charles Fisher, been apprised of the fact that this was a criminal investigation. As an accountant, Mr. Fisher was one of the few people who was capable of appreciating the distinction between the two types of agents. On the document receipt given to Mr.

Fisher, Mr. Nielsen omitted his title of "special agent." Although there were five other document receipts in evidenc all of which were given to laymen, this was the only docume receipt which omitted Mr. Nielsen's title.

The first document receipt was issued on April 21, 1964, and stated that the investigation was in re "Jim Pinkerton" (Exhibit 1). The document receipt of December 18, 1964, the day appellants contend the investigation of Mr. Goodman commenced, stated that the documents were given in re "Jim Pinkerton" (Exhibit 2). On December 21, 1964, the very day appellees allege that Mr. Goodman was advised that he was the subject of a criminal investigation and was requested to produce his personal cancelled checks, the document receipt was also issued in the name of James Pinkerton (Exhibit 3). An examination of this document receipt reveals that it pertained to post-1962 deposits of Paramount. These items could only have remotely pertained to Mr. Pinkerton's investigation since Paramount was no longer owned by him after this time. Rather, this information must have been part of either the Goodman investigation or a post-1962 Paramount investigation. Notwithstanding this, all of the document receipts issued through December 21, 1964 were in the name of Pinkerton. The only reason for this was to keep Mr. Goodman deceived and confused.

D. The Agents Made No Attempt To Eliminate

The Confusion.

The government agents never used the word "criminal" or explained to Mr. Goodman that the investigation was criminal in nature until January 8, 1965. By this time, all of appellants' records were in appellees' possession.

It is submitted that the government agents purposefully and intentionally undertook a massive scheme of deception so that at every opportunity, they purposely compounded their deception and appellants' confusion. The agents purposely and consistently failed to make a meaningful explanation of their function or of the subject of the investigation. An example of Mr. Nielsen's efforts to keep appellants confused is aptly set forth at page 68 of the Reporter's Transcript. The document receipts added to the purposeful confusion.

It is submitted that pursuant to the authority contained in Kohatsu, Gouled and Miranda, any and all statements made, books and records obtained, and copies of such books and records, were obtained from appellants in violation of the Fourth Amendment and therefore, should be suppressed as evidence in any future criminal proceeding. In addition, any and all copies of this material must likewise be returned to appellants.

* * * * *

III.

THE FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE CLEARLY ERRONEOUS

Appellants object to the following findings of fact:

"VIII

"Both [Mr. Nielsen and Mr. Stutz] displayed their commissi to Mr. Goodman. Mr. Goodman asked about the difference between a Special Agent and an Internal Revenue Agent. Mr. Nielsen explained the difference."

"X

"Certain books beyond 1962 were taken [on April 9, 1964 by Mr. Nielsen and Mr. Stutz]. . . ."

"XI

"On December 18, 1964, Mr. Nielsen returned to Paramount with Internal Revenue Agent Keith Loebig, to continue the Pinkerton-Paramount investigation. . . . Mr. Nielsen asked for other books and records of Paramount generally for the period subsequent to 1962, because Jim Pinkerton had continued to have transactions with Paramour subsequent to that date."

"XII

"After returning from Paramount on December 18, 1964, Special Agent Nielsen was given a preliminary assign ment on Mr. Goodman so as to conduct a personal interview of Mr. Goodman concerning his affairs."

"XIII

"The preliminary investigation began on December 21, 1964. . . .He was told that he had a right against self incrimination, that he had a right to have an attorney present, that anything he said could be used against him. Mr. Goodman stated that he understood his rights, and identified six personal income tax returns. Special Agent Nielsen asked Mr. Goodman if he would voluntarily produce his personal cancelled checks, and informed Mr. Goodman that he was not obligated to do so. Mr. Goodman agreed to make said checks available. Mr. Goodman also agreed to make available the books of Frigid Process Co., South Pasadena and Las Vegas, which were kept at Frigid Process Co., South Pasadena, premises, and the date agreed on for this purpose was December 30, 1964.

"Special Agent Nielsen also asked Mr. Goodman for permission to examine additional records of Paramount as part of the Pinkerton-Paramount investigation. Mr. Goodman gave such permission and asked his bookkeeper to make available to the Agents any books and records they wanted to see Mr. Nielsen took more books of Paramount with him concerning the Pinkerton-Paramount investigation and again left a receipt, which stated their names and titles."

"XIV

"Mr. Goodman produced his personal cancelled checks [December 23, 1964], after being again told by Mr. Nielsen

that he did not have to turn them over."

"XVII

"Mr. Goodman was again informed [on January 8, 1965] of his right against self-incrimination, and of his right to an attorney. During this meeting he invoked his right against self-incrimination. Mr. Nielsen did not shout; did not promise leniency, and did not accuse Mr. Goodman of lying . . . .Later the same day, Mr. Goodman returned to the area where the two Agents were working and initiated a discussion of some of the matters discussed previously in the earlier interview."

"XIX

"On January 12, 1965, they [the agents] saw Mr. Goodman, and Mr. Goodman stated that he had not decided yet whether to engage an attorney or not. On January 12 the agent were permitted to take with them certain books of Frigid. They left a receipt for said books, signed by both of them and showing their titles. It was made out 'In Re Jack Goodman and Frigid Process Co.'"

"XXII

"No fraud, deceit, concealment or misrepresentatio was committed by any of the defendants to obtain for examination, copying and taking any of plaintiffs' books, records and documents."

"XXIII

"Permission was given voluntarily by plaintiffs

to defendants to examine, copy and take plaintiffs' books, records and documents."

Appellants object to the following conclusions of law:

"2. No rights of any of the plaintiffs were violated under the Fourth Amendment to the United States Constitution.

"3. No rights of any of the plaintiffs were violated under the Fifth Amendment to the United States Constitution.

"4. No rights of any of the plaintiffs were violated under the Sixth Amendment to the United States Constitution.

"5. That defendants are entitled to judgment herein."

Appellants object to the foregoing findings of fact on the grounds that each finding is controverted by the testimony of Mr. Goodman and third-party witnesses, Evelyn Gedatus and Ruth Myshrall. In addition, many of the findings are demonstrably false by reason of their inconsistency with other evidence, all which is set out in full in the following argument. When viewed in light of the heavy burden which must be overcome by appellees in the area of waiver of constitutional rights, these findings and conclusions of law must be set aside.

A. The Findings Of Fact Are Not Entitled To

Full Weight.

Under Rule 52 of the Federal Rules of Civil Procedure, findings of fact of a Trial Court shall not be set aside unless clearly erroneous. Fed. R. Civ. P. 52. The Supreme Court has defined the term "clearly erroneous" as follows:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

The findings of fact proposed by appellees were adopted in haec verba by the District Court and were entered six days after being lodged. (C.T. 248-54.) Appellants made no objections to the proposed findings since they feared that if protracted hearings were held on objections, this appeal could have rendered moot by an intervening indictment. Hoffritz v. United States, 240 F.2d 109, 111 (9th Cir. 1956). At various times during the trial counsel for the appellees refused to guarantee the status quo even during the trial proceedings itself so that several restraining orders were necessary. (C.T. 156,173 190.) Since the findings of the court represented the complete adoption of appellees' proposed findings, they are

not entitled to the same weight as findings and conclusions actually prepared by the Trial Court. Roberts v. Ross, 344 F.2d 747, 751-52 (3rd Cir. 1965); United States v. Howard, ____F.2d_____, 17 AFTR 2d 900 (3rd Cir. 1966.)

B. The Findings Of Fact And Conclusions Of Law Are Against The Weight Of Evidence And Are Clearly Erroneous.

The findings of the District Court and the conclusions of law are clearly erroneous and are against the weight of the evidence due to the sharp conflicts in the testimony concerning the advising of constitutional rights and the numerous inherent testimonial inconsistencies. Since a person under investigation is always at a disadvantage if for no other reason, than there are usually two government agents testifying that the individual was properly advised of his constitutional rights, a detailed examination of the most significant areas of testimonial inconsistency is vital. 8 Moore's Federal Practice ¶41.07[2]

1. Mr. Nielsen testified that Mr. Goodman questioned Mr. Stutz and him at their initial meeting about the difference between special agents and revenue agents. (R.T. 24.) It apparently is appellees' position that Mr. Goodman was the one individual in a hundred who knew of this distinction even though both of the agents confronting him were special agents. Even if Mr. Pinkerton contacted Mr. Goodman after Mr. Pinkerton's initial meeting

with Mr. Nielsen and Mr. Stutz the previous day, Mr. Pinkerton did not know the nature of the investigation. According to Mr. Nielsen, he did not tell Mr. Pinkerton that he was conducting a criminal investigation because Mr. Pinkerton had not asked. (R.T. 20-21.) It is incredible that Mr. Goodman, one who had never met an internal revenue employee prior to this time, was sophisticated enough in this complicated area to asked about the difference.

2. Mr. Nielsen and Mr. Loebig contacted Mr. Charles Fisher, the accountant for Mr. Goodman, Mr. Pinkerton and Paramount, and obtained certain of his records pertaining to Mr. Pinkerton and Paramount. (R.T. 80. Mr. Nielsen's claim that it was only inadvertence which caused him to omit his title from the document receipt given Mr. Fisher is questionable. (Exhibit 5.) Since there has been no testimony that there was ever a meaningful identification of Mr. Nielsen to Mr. Pinkerton, it is submitted that Mr. Nielsen's failure to properly identify himself was probably to prevent such information from getting back to Mr. Pinkerton by a public accountant, one of the few persons to whom the distinction between a revenue agent and a special agent was meaningful. Of the six document receipts in evidence, this is the only one where Mr. Nielsen's title was omitted.

3. Mr. Nielsen testified that pursuant to

prior approval of his group supervisor, he requisitioned Mr. Goodman's personal income tax returns as part of an "official investigation" on November 6, 1964 and November 10, 1964. (R.T. 61; Exhibit 9.) Mr. Nielsen then testified that his sole purpose in requisitioning these returns was to determine whether Mr. Goodman properly reported a particular item of income. (R.T. 55.) Even though Mr. Nielsen concluded that the item had been properly reported he nevertheless decided to formally investigate Mr. Goodman. Mr. Nielsen testified that after his visit to Paramount on December 18, 1964, he returned to his office and discussed the case with his group supervisor. (R.T. 54.) The meeting with his group supervisor was necessarily very brief since Mr. Nielsen testified that after leaving Paramount at 3:00 or 4:00 P.M., he first returned the government car and then discussed various unrelated cases with his supervisor. (R.T. 53.) Presumably, the drive from Burbank to the Federal Building in Los Angeles during a Friday evening rush hour must have taken at least a half an hour and possibly longer. Since Mr. Nielsen's working hours were 8:45 A.M. to 4:45 P.M., it is doubtful that he discussed this matter at any great length, if at all. It is submitted that Mr. Nielsen had decided to investigate Mr. Goodman prior to this meeting which he allegedly had with his supervisor.

4. Mr. Nielsen's testimony that the only

reason he limited his examination of Paramount's books in April, 1964, to transactions for the years 1959 to 1962 was so as not to inconvenience the bookkeeper, (R.T. 41,) was refuted by Mrs. Myshrall. (R.T. 226.) She testified that examination of post-1962 books and records would not have been inconvenient. More importantly, she stated Mr. Nielsen told her that he was only interested in Paramount's books for the time when Paramount was owned by Mr. Pinkerton. (R.T. 212, 215.)

5. Mr. Nielsen testified that on December 21, 1964, after asking Mr. Goodman to identify his personal income tax returns, he fully advised him that his returns were now being investigated and that he possessed certain constitutional rights. (R.T. 68.) Mr. Goodman denied that he was warned of his constitutional rights on this day or that he was told he was now the subject of a criminal investigation. (R.T. 305-06.) Rather, he testified that he was told he was being questioned as part of the continuing investigation of Mr. Pinkerton, an individual with whom he had had extensive business dealings in the past and with whom he continued to have such dealings. He told this to Mrs. Myshrall as soon as the agents left. (R.T. 216-217.) Mr. Nielsen further testified that at this meeting he asked many questions about Mr. Goodman's personal and business affairs, and that he asked him to produce his personal cancelled checks. (R.T. 69,74.) He indicated

that they discussed Frigid Process Co. of South Pasadena and Las Vegas and that Mr. Goodman advised him that Mrs. Gedatus would have the records available for examinatio on December 30, 1964. (R.T. 73, 74.) Mr. Goodman and Mrs. Myshrall testified the meeting took only a few minutes. (R.T. 213, 307.) It is submitted that a meaningful explanation of constitutional rights alone could not have been given in such a short period of time. That Mrs. Myshrall and Mr. Goodman are probably telling the truth is further established by the document receipt given on this day. (Exhibit 3.) If there had been a meaningful explanation given and Mr. Goodman was told that he was the subject of a criminal investigation, there would have been no reason to issue the document receipt: "in re: James Pinkerton". Quite apparently, Mr. Goodman was not informed even though the records taken this day pertained solely to Paramount's deposit slips for the years 1961 through 1964. The major portion of these records could not have had any application to Pinkerton's investigation or to Paramount's for years prior to 1962. These recrods, rather, only concerned Mr. Goodman and Paramount when it was owned by Mr. Goodman. The agents admitted that they knew Mr. Goodman was president of Paramount after April, 1962. (R.T. 455.)

There is attached to this brief, as Appendix A, two letters to the University of Chicago Law Review

dated May 6, 1965 and May 27, 1965, from Mitchell Rogovin, then Chief Counsel of the Internal Revenue Service, who is presently Assistant Attorney General, Tax Division. These letters stated, in part, as follows:

> "It is the general practice of the Intelligence Division that a taxpayer be advised in criminal income tax cases of his right to counsel when offered the opportunity to attend an interview with officials of that Division at the conclusion of the investigation." (Emphasis supplied.)

Mr. Nielsen testified that he advised Mr. Goodman of his rights at the outset of the investigation notwithstanding the general policy of the Intelligence Division. It is submitted that an examination of Mr. Nielsen's conduct throughout this investigation demonstrates the improbabilit of such action on his part.

6. Mr. Nielsen testified that Mrs. Gedatus knew he and Mr. Loebig were coming to see her on December 30, 1964. (R.T. 91.) This testimony is directly contradicted by Mrs. Gedatus. There is further conflict whether the agents told Mrs. Gedatus that they were conducting a "routine audit". (R.T. 248.) There has certainly been no reason demonstrated why Mrs. Gedatus would have purposefully lied about her meeting with the

agents.

7. The agents testified that the meeting conducted on January 8, 1965 was a pleasant meeting which began at about 11:00 A.M. and which was conducted in normal conversational tones. (R.T. 107.) The agents' characterization of the meeting is in serious question since Mrs. Gedatus testified that she could hear the loud voices and shouting over the noise of the machinery, and that when Mr. Goodman left the meeting, he was so upset that she was worried about him and was required to place a telephone call for him. (R.T. 252-254.)

8. Mr. Nielsen testified that he and Mr. Loebig appeared at Frigid during the morning of January 12, 1965 and Mr. Nielsen specifically remembered seeing Mr. Goodman at 11:25 A.M. (R.T. 118.) Mr. Nielsen, however, does not remember when he and Mr. Loebig left Frigid that day; when they discussed taking the books and records with Mrs. Gedatus; or whether he returned to his office that day. (R.T. 119-120.) This was the day, however, when the original of Exhibit 6 was issued. Mr. Nielsen's testimony ultimately appears to be that he gave this receipt to Mrs. Gedatus and not to Mr. Goodman. (R.T. 120-121.) Mrs. Gedatus testified that this receipt was never given to her, but rather, that she was given a slip of paper which contained the various items taken by Mr. Nielsen.(R.T. 255-256.) In addition, she was also

given another slip of paper by Mr. Nielsen, (Exhibit 7), which contained Mr. Nielsen's telephone number. Mr. Nielsen stated that Exhibit 7 was genuine, and he further stated that he may have given Mrs. Gedatus a slip of paper listing the various records of Frigid which the agents took with them that day. (R.T. 122-123.) If the original of this exhibit had been given by Mr. Nielsen to Mrs. Gedatus, there would have been no reason why he would have had to give Mrs. Gedatus his telephone number on a separate slip of paper since Mr. Nielsen's telephone number is contained on the form. It appears to be appellees' contention that it was purely coincidental that on the very day Mr. Goodman was conferring with his then attorney for the first time, the agents decided to take Frigid's books with them to the Federal Building. According to Mr. Loebig, the reason the books were taken this day was that Mr. Nielsen wanted to examine Frigid's cancelled checks and "it would have taken a lot of time to go out to Frigid driving back and forth". (R.T. 464.) This is refuted by an examination of Exhibit 6 which reveals that not only were cancelled checks of Frigid taken, but in addition, the agents took all of Frigid's cash receipts, cash disbursements, purchases, sales and general journals on this date.

In instances where there has been a conflict between the testimony of a suspect and investigating agents, courts have noted the tendency on the part of the agents to

misrepresent the facts and have rejected such testimony. Greenwell v. United States, 336 F.2d 962 (D.C. Cir. 1964); Judd v. United States, 190 F.2d 649 (D.C. Cir. 1951). See also 8 Moore's Federal Practice, supra. Additionally, where a pattern of massive deception on the part of the investigating agents is shown to exist and conflicts between the agents' testimony and the testimony of third parties appear, a court should pause before accepting the agents' testimony. Further, where the agents' testimony conflicts with their own documents, i.e., the Document Receipts, the agents' story becomes doubtful.

While appellees could have attempted to corroborated the agents' testimony with the production of the contemporaneously prepared notes of the conference with Mr. Goodman, not only did they fail to do this, but they steadfastly refused to produce these in response to appellants' subpoenas duces tecum.

C. Appellees Have The Burden Of Proof To Establish That Appellants' Constitutional Rights Were Intelligently And Knowingly Waived.

The appellees have the burden of establishing by clear and convincing proof that the appellants waived their constitutional rights or consented to unconstitutional searches and seizures. This concept is consistent with the pronouncement found in Johnson v. Zerbst, 304 U.S. 458 (1938), that "'courts indulge every reasonable presumption

against waiver' of fundamental constitutional rights". Miranda v. Arizona, 34 U.S.L.Week 4521 (U.S. June 13, 1966), makes it clear that this, more than ever is still the state of the law.

In two recent cases the Ninth Circuit has discussed the question of burden of proof when the issue of consent or waiver of constitutional rights has arisen. In Channel v. United States, 285 F.2d 217 (9th Cir. 1960), the court stated:

> "A search and seizure may be made without a search warrant if the individual freely and intelligently gives his unequivocal and specific consent to the search, uncontaminated by any duress or coercion, actual or implied. The Government has the burden of proving by clear and positive evidence that such consent was given. Judd v. United States, 89 U.S. App. D.C. 64, 190 F.2d 649, 650."

In United States v. Page, 302 F.2d 81, 83-84 (9th Cir. 1962), Judge Duniway stated:

> "The government must prove that consent was given. It must show that there was no duress or coercion, express or implied. The consent must be 'unequivocal and specific' and 'freely and intelligently given'. There must be convincing evidence that the

defendant has waived his rights. There must be clear and positive testimony. '"Courts indulge every reasonable presumption against waiver" of fundamental constitutional rights.' Coercion is implicit in situations where consent is obtained under color of the badge, and the government must show that there was no coercion in fact."

To the same effect see Villano v. United States, 310 F.2d 680, 684 (10th Cir. 1962). In Carnley v. Cochran, 369 U.S. 506, 516 (1962), the court stated that:

> "The prosecution has the burden of showing that a suspect, once the investigation has reached the accusatory stage, was informed of his constitutional rights to counsel and to remain silent at that stage, or that he knowingly and intelligently waived those rights. Waiver cannot be presumed from a silent record."

In Greenwell, 336 F.2d at 966, in discussing the waiver of constitutional rights, the court stated:

> "There is a presumption of involuntariness which the government must rebut, if it can, with 'clear and positive evidence'. Were the police version as to the accused's

cooperation always to be accepted, the laws' restriction on police activity would have little effect."

As stated above, Miranda reaffirmed these principles. The court there specifically reaffirmed the holding of Johnson, as applied to that factual situation, and cited Carnley, with approval.

D. Appellees Have Failed To Overcome Their Heavy Burden.

The only evidence in this entire record by which appellees attempt to overcome this "presumption of involuntariness", is the testimony of Mr. Nielsen and Mr. Loebig. (Mr. Stutz testified that his testimony was based primarily upon a reading of Mr. Nielsen's memoranda.) Appellees apparently chose not to bolster such testimony by producing any written notes or memoranda.

It is submitted that sufficient areas of doubt have been established throughout this entire record which rule out any conclusion that appellees have proved waiver by clear, convincing and positive testimony. Significantly, both Mr. Nielsen and Mr. Loebig testified that they did not know whether Mr. Goodman understood the criminal nature of the investigation that they were conducting of appellants. (R.T. 102, 103.) Mr. Loebig specifically said he did not know what was in Mr. Goodman's mind in this respect. (R.T. 443.) The above cases clearly

establish that the existence of any doubts of waiver or consent must be resolved against appellees.

It is submitted that when the pattern of significant testimonial inconsistency is studied, it not only demonstrates the questionableness of agents' credibility, but demonstrates that the findings of fact and conclusions of law are clearly erroneous and should be set aside. Considering the heavy burden which rests upon the appellees, it is submitted that the agents' testimony should have been rejected by the District Court.

IV.

ALL BOOKS AND RECORDS OBTAINED FROM APPELLANTS MUST BE SUPPRESSED AS EVIDENCE AND COPIES THEREOF RETURNED TO APPELLANTS

A. Constitutional Rights Attach At The Commencement Of A Criminal Tax Investigation.

As early as 1885, the Supreme Court in Boyd v. United States, 116 U.S. 616 (1885), established that constitutional rights attach to private books and records. The question presented in this case concerns the particular point in time when these constitutional rights attach during the course of an Internal Revenue Service investigation. In the most recent case of Miranda v. Arizona, 34 U.S.L. Week 4521 (U.S. June 13, 1966), the Supreme Court held that a person's constitutional rights attach at the time he "has been taken into custody or otherwise deprived

of his freedom of action in any significant way." Since Miranda did not purport to decide the question of when these constitutional rights attach in non-custody situations or where custody rarely, if ever occurs, this Court must determine the effect of Miranda in non-custody situations and formulate guidelines in this area.

1. The function of a Special Agent in an Internal Revenue Service investigation is to conduct a criminal investigation.

An Internal Revenue Service investigation is the non-custody situation involved in this case. There are two basic types of agents of the Internal Revenue Service: special agents of the Intelligence Division and revenue agents of the Audit Division. The function of special agents is to enforce

> "The criminal statutes applicable to income, estate, gift, employment and excise tax laws. . .by developing information concerning alleged criminal violations thereof, evaluating allegations and indications of such violations to determination investigations to be undertaken, investigating suspected criminal violations of such laws, recommending prosecution when warranted, and measuring effectiveness

of the investigation and prosecution processes." (Emphasis supplied.) 30 Fed. Reg. 9399-9400 (July 28, 1965), 1966 CCH Stand. Fed. Tax Rep. §5988.

The basic function of revenue agents, on the other hand, is to conduct field examinations to determine the correct civil liabilities of taxpayers, and, occasionally to "participate with special agents of the Intelligence Division in the conduct of tax fraud investigations. . . ." 30 Fed. Reg. 9368 et seq. (July 28, 1965), 1966 CCH Stand. Fed. Tax Rep. §5988. During the course of an investigation conducted by a special agent, the sole purpose is to obtain evidence of the commission of a crime. At no time is the special agent or, in a joint investigation, the revenue agent, to discuss or attempt to settle the question of civil tax liability. As one commentator aptly noted:

> "The sole function of a special agent in the Intelligence Division of the Internal Revenue Service is to seek evidence of crimes. He has no concern whatsoever with the amount or collection of any additional tax, these being strictly the concern of the revenue agent. He is exactly the same as any other Treasury Agent

who may seek evidence of narcotics, counterfeiting, alcohol tax, customs violations, etc. A special agent is a criminal law enforcement officer, just like any state or municipal detective or policeman." Burns, Searches and Seizures: The Suppression of Evidence, 20 N.Y.U. Institute on Federal Taxation 1081, 1087 (1962).

If, at the conclusion of the criminal investigation, the special agent recommends criminal prosecution, the taxpayer is then afforded the opportunity to confer at various levels with government officials in both the Treasury and Justice Departments. If the taxpayer fails at all of these various conference levels to dissuade prosecution, the case is then referred to the United States Attorney who is instructed to obtain an indictment. Very rarely, if ever, will an arrest occur prior to indictment in an Internal Revenue Service investigation.

The taxpayer's right to refuse access to his books and records in a criminal tax investigation is as important to him as is the suspect's right to remain silent in the normal criminal investigation. In each case the investigator is attempting to elicit either incriminating statements or incriminating books and records; each

in its own way provides the basis for a successful prosecution from either his lips or his pen.

With this brief background, an analysis of the Supreme Court's decision in Miranda becomes necessary to determine at what point the constitutional privileges so carefully preserved in Miranda attach for the protection of the taxpayer under criminal investigation.

2. Miranda does not purport to determine when constitutional rights attach in non-custody situations.

Miranda begins where Escobedo v. Illinois, 378 U.S. 478 (1964) terminates. In Escobedo, the Supreme Court stated that the police investigation of an accused prior to trial was a most significant stage when constitutional rights may be irretrievably lost. The court stated:

> "This was the 'stage when legal aid and advice' were most critical to petitioner. . . .since rights 'may be as irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes.'" Id. at 486.

In expanding upon the need for protection of constitutional rights prior to trial, the court stated:

> "The rule sought by the State here,

however, would make the trial no more than appeal from the interrogation; and the 'right to use counsel at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pre-trial examination'. . . .'one can imagine a cynical prosecutor saying: "'Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at the trial.'" Id. at 487-88.

In Miranda and its three companion cases (Vignera v. New York, Westover v. United States and California v. Stewart), all four of the defendants were in police custody at the time they uttered the incriminating statements. The court elaborated upon the need for protecting constitutional privileges when a criminal defendant is in the custody of the police and noted that

> "There can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings. . . ,"
> 34 U.S.L. Week at 4530,

and that

> "The prosecution may not use statements,

whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Id. at 4523.

The court in Miranda did not purport to examine the question of when these constitutional rights attach if the particular crime involved did not involve "custody" or the "deprivation of freedom of action in any significant way". Nonetheless, the combined philosophy of Escobedo and Miranda must be considered applicable where the particular crime involved does not normally result in "custody".

3. This Court must determine when constitutional rights attach in an Internal Revenue Service investigation.

In applying Miranda, it is clear that the rights granted by the Fifth and Sixth Amendments to the Constitution must attach at some point prior to the conclusion of the investigation. If this were not the case,

the presence of counsel at trial would have little effect and would be a meaningless and empty jesture. Logically, Miranda and Escobedo must apply to violations of income tax laws just as it does with respect to violations of other criminal statutes. This was most aptly phrased by one court:

> "In these days of Constitutional turmoil concerning the rights and privileges of an accused person as guaranteed by the United States Constitution, it should be obvious that a taxpayer charged with violating the Internal Revenue Code is entitled to the same Constitutional protection as a person charged with committing a crime of violence. In that regard also, when agents of the Internal Revenue Service seek out evidence of a violation of the tax laws with a view toward a criminal prosectuion, they occupy the same position as a policeman or detective who is ferreting out crimes on a wider scale and usually, of a different nature." United States v. Gower, _____F.Supp._____, 65-2 USTC ¶15,655 (M.D.Pa. 1965).

When do the rights guaranteed by the Fifth and Sixth Amendments attach in a tax investigation?

When a revenue agent is conducting an audit of a particular taxpayer's books, his inquiry is entirely of a civil nature and no warning of constitutional rights need be given by him. But when a criminal investigator such as a special agent initiates an investigation, an effective warning of these rights must be given. Appellants contend that a full scale criminal investigation of Mr. Goodman by a special agent began on December 18, 1964. At this point, Mr. Goodman should then have been meaningfully advised of his constitutional rights.

4. Appellants should have been advised of their constitutional rights at the commencement of this criminal investigation.

In the instant case, the investigation of appellants originally commenced as an investigation of James Pinkerton. (R.T. 9, 17.) That investigation was commenced by two special agents of the Internal Revenue Service, both attached to the Intelligence Division. (R.T. 18.) That investigation occurred primarily during the month of April, 1964, and took place at the offices of Paramount. (R.T. 18.)

Approximately six months later, Mr. Nielsen discussed Mr. Goodman with his group supervisor and obtained approval to requisition Mr. Goodman's personal

income tax returns. (R.T. 56; Exhibit 9.) Mr. Nielsen requisitioned these returns during November as a part of an "official investigation". (R.T. 58, 61.) Although Mr. Nielsen testified that the purpose for requisitioning these returns was to determine whether Mr. Goodman reported a particular item of income, Mr. Nielsen maintained possession of these returns even though he was satisfied that the particular item of income had, in fact, been reported. (R.T. 61-2, 446.) On December 18, 1964, Mr. Nielsen returned to Paramount, this time accompanied by Internal Revenue Agent Keith Loebig. Mr. Nielsen admitted that he knew Mr. Goodman had acquired control of Paramount as of March, 1962, (R.T. 455), yet he examined Paramount's books for the period subsequent to March, 1962; something which he had never previously done. (R.T. 44-45; Exhibit 2.) Mr. Goodman's returns were in his possession when he visited Paramount on this date. (R.T. 446.) Mr. Nielsen admitted that on December 18, 1964 no warning whatsoever was given relating to any constitutional rights. (R.T. 62.)

On their return to Paramount on December 21, 1964, Mr. Nielsen claimed he informed Mr. Goodman that he was now the subject of an investigation and he was asked to identify his personal returns and asked to produce his personal cancelled checks. (R.T. 67-69, 76.) On this date, the books and records of Paramount for the

period subsequent to March of 1962 were further examined. (Exhibit 3.) This investigation of Mr. Goodman by means of an examination of the books and records of Paramount continued during the balance of December. On December 30, 1964, the agents asked to see the books and records of Frigid, (R.T. 90-91.), a corporation wholly owned by Mr. Goodman, as a continuing part of the investigation of him. During January, 1965, the agents carefully examined and analyzed substantially all of the books and records of Frigid.

It is submitted that all of the foregoing demonstrates that this criminal investigation of Mr. Goodman conducted by a special agent began not later than December 18, 1964 and that he should have been admonished of his constitutional rights also not later than that time.

If the criminal investigation of Mr. Goodman did not commence by December 18, 1964, there can be little question but that it began by December 21, 1964. Mr. Nielsen testified as follows:

> "I told Mr. Goodman that up to this time all of our discussions with him, all of our conversations out there had been pertaining to the Pinkerton-Paramount investigation. I said at this time, at December 21, 1964, we were speaking to him regarding his

own personal income tax returns. I said that I now had an investigation on his own personal returns." (R.T. 67-68.)

Clearly, from this time forward, the agents were conducting a full scale investigation of Mr. Goodman and were attempting to obtain either incriminating statements or incriminating books and records in order to establish his commission of a criminal violation of the Internal Revenue laws. Our basic concepts of fairness for accuseds demand that an admonition of constitutional rights should be given at this point.

B. The Required Admonition Of Constitutional Rights Was Not Given.

1. Miranda requires that warning of constitutional rights must be meaningful.

In Miranda, the Supreme Court held that:

"Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily knowingly

and intelligently." 34 U.S.L. Week at 4523. Since the factual situations in Miranda and its three related cases all involve instances where the subject was in police custody, it was apparent that the subjects were obviously aware of the fact that they were the subjects of a criminal investigation. However, where one is unaware of the fact that a criminal investigation is in process or that he is the subject of that criminal investigation, the Supreme Court in Miranda certainly would have insisted that the investigator inform the subject of these facts so that the ensuing warning of Fifth and Sixth Amendment rights would be meaningful.

2. Appellants were not effectively advised of their constitutional rights since they were not informed of the criminal nature of the investigation.

Mr. Nielsen admitted that on December 18, 1964, no admonitions of any constitutional rights were given. (R.T. 62.) On December 21, 1964, Mr. Goodman was not advised that the investigation then in progress was a criminal investigation. (R.T. 67-68.) Since Mr. Goodman was not in custody, it was incumbent for the special agent to inform him that the investigation was one of a purely criminal nature. Mr. Nielsen testified that he never used the word "criminal" or "pentitentiary" at any time during this entire investigation. (R.T. 68.) Mr. Loebig recalled that the only time the word "criminal"

was used was on January 8, 1965, toward the end of the entire investigation. (R.T. 450, 454.) Mr. Loebig further testified that he had no idea whether Mr. Goodman realized, prior to January 8, 1965, that a criminal investigation was in progress. (R.T. 443.)

Since this investigation originally commenced as an investigation of Mr. Pinkerton which subsequently shifted to an investigation of appellants, the attendant confusion demonstrated above rendered it especially important that a clear and meaningful explanation of the criminal nature of the investigation be given appellants.

If it held that if a meaningful admonition of constitutional rights should have been given on December 18, 1964, the statements made to Mr. Goodman on December 21, 1964 (R.T. 67-68) should not be considered as curing the defects which arose on December 18, 1964. Once Mr. Goodman had unwittingly allowed the agents to review and examine Paramount's post-1962 books and records on December 18, 1964, it was futile for him to have later refused to deliver additional books and records. If an admonition of constitutional rights is to be meaningful choice between two alternatives, such a warning must occur prior to the improper delivery of any incriminating documents.

Although the agents testified that at his

request, Mr. Goodman was apprised of the difference between a special agent and a revenue agent in April, 1964 during the investigation of James Pinkerton, it cannot be seriously contended that this explanation was adequate. The length of time which elapsed, a period of eight and one-half months, nullified the consequence of such a prior explanation if it in fact was actually given. Surely one must be informed of the criminal nature of an investigation at a time in reasonably close proximity to the actual warning of any constitutional rights. Additionally, there is substantial question whether Mr. Neilsen's explanation of the different functions of a special agent and a revenue agent in April, 1964 was adequate to convey, in a meaningful fashion, this distinction to a lay person. In relating this explanation, Mr. Neilsen testified:

> "I told him an Internal Revenue Agent conducts civil audits; a Special Agent conducts an investigation to determine whether any of the Internal Revenue laws have been violated, whether there has been any attempt to evade or defeat the payment of any income taxes." (R.T. 24)

The confusing nature of this explanation is apparent when it is recognized that there are many sections of the Internal Revenue Code which use

substantially similar or identical language in discussing civil, as opposed to criminal, conduct. Compare civil section 6653(a), 6653(b), 6653(e), 6672, 6674, and 7268, of the Internal Revenue Code of 1954, as amended, with criminal sections 7201, et seq. of the Internal Revenue Code of 1954, as amended.

3. Kohatsu v. United States is distinguishable

Kohatsu v. United States, ____F.2d____ (9th Cir. 1965) cert. den. ____U.S.____(1966), is inapplicable to this case. In Kohatsu, the taxpayer was always aware that he was the subject of an Internal Revenue investigation. In this case, however, Mr. Goodman did not know (and had no way of knowing) that he was the subject of any type of investigation when the agents returned to Paramount on December 18, 1964. But the most significant distinction between this case and Kohatsu is the fact that the investigation in Kohatsu originally commenced as a civil investigation and shifted to one which was criminal in nature. In this case, the investigation was always criminal in nature. Thus, the burden this Court thought inappropriate to impose upon the government in Kohatsu, i.e., advising a taxpayer as to the direction in which the necessarily fluctuating investigation leads, in simply not involved in this case.

C. The Obtaining Of Books And Records Commencing On December 18, 1964, Violated The Fourth Amendment.

Even if it were conceded, which it is not, that the agents fully apprised Mr. Goodman of his constitutional rights and the fact that he was the suspect in a criminal investigation, it is submitted that the obtaining of Paramount's books and records and Mr. Goodman's records on and after December 18, 1964, violated Paramount's and Mr. Goodman's rights under the Fourth Amendment.

In Channel v. United States, 285 F.2d 217 (9th Cir. 1960), this court, prior to Escobedo and Miranda held that if an individual's consent to a search amounts to nothing more than false bravado, the consent is not truely voluntarily given. See also Judd v. United States, 190 F.2d 649 (D.C. Cir. 1951).

According to Mr. Nielsen's testimony, on December 21, 1964, Mr. Goodman after being advised of his rights, stated: "I understand my rights. I have nothing to hide. Go ahead and question me." (R.T. 69.) This alleged statement bears striking similarity to those uttered by the defendants in Channel and Judd. It is submitted that Mr. Goodman, having been previously questioned at various times prior to December 21, 1964 by different government agents to whom a considerable quantity of books and records had previously been supplied, who was confused at the nature and scope of the investigation, who had not consulted counsel, did not freely and intelligently give his unequivocal and specific consent to

an examination of any of the books and records of appellants

In light of Escobedo and Miranda, the teachings of Channel and Judd are more viable today than when they were first enunciated. When all of the factors in this case are considered, it is submitted that, on and after December 18, 1964, Mr. Goodman did not voluntarily and intelligently consent to the examination of any of the books and records. Therefore, all of such records were obtained illegally and must be suppressed as evidence and all copies thereof returned to appellants.

It is submitted that a criminal investigation in this case was commenced by December 18, 1964, or in no event later than December 21, 1964. As a prerequisite to the use of any evidence obtained from such investigation, the agents were required to explain to Mr. Goodman, in a meaningful fashion, that he was the subject of a criminal investigation and admonish him of his constitutional rights under the Fifth and Sixth Amendments. Since these warnings and statements were either not made, or not effectively and meaningfully made, all evidence obtained on and after the relevant date must be suppressed and all copies of books and records must be returned to appellants. Any additional information or evidence which was derived, directly or indirectly, from said illegally obtained evidence must be suppressed as well. As Mr. Justice Holmes said in Silverthorne Lumber Co. v.

United States, 251 U.S. 385, 392 (1920), "the essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all." See also Nardone v. United States, 302 U.S. 379 (1937).

CONCLUSION

Appellants respectfully submit that the District Court erred in granting appellees motion to quash appellants' subpoenas duces tecum and that this case should be remanded to the District Court with instructions that the subpoenas be honored and further proceedings be held.

Appellants further submit that the Judgment of the District Court is erroneous and should be reversed and that this Court determine that all of appellants' books, records and memoranda were obtained in violation of the Fourth, Fifth and Sixth Amendments to the Constitution of the United States, that all such material be suppressed as evidence in any future proceedings, and that all such material and all copies thereof be returned to appellants.

Respectfully submitted,

GOODSON AND HANNAM

By _____
Walter S. Weiss

_____
Melvyn Mason
Counsel for Appellants

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

Walter S. Weiss

APPENDIX A

U.S. TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

WASHINGTON, D.C. 20224

ICE OF
COUNSEL
-488

MAY 6 1965

Mr. Duane W. Krohnke
Office of the Editor
The University of Chicago Law Review
Chicago 37, Illinois

In re: Application of Massiah and Escobedo to Income Tax Investigations

Dear Mr. Krohnke:

This is in further regard to your letters of March 29, 1965 to Mr. G. d'Andelot Belin, General Counsel of the Treasury Department, and Mr. Arnold Sagalyn, Director, Office of Law Enforcement Coordination, regarding the Massiah and Escobedo cases. Specifically, you inquire as to their effect on the investigative techniques of law enforcement agencies of the Treasury Department. Our remarks are limited to the manner in which the cases in question affect the investigative activities of the Internal Revenue Service in the income tax area.

In Massiah v. United States, 377 U.S. 201 (1964), incriminating statements made by the petitioner and picked up on a hidden radio were deemed inadmissible as evidence. The Court relied on the Sixth Amendment guarantee of right to counsel and did not reach the question of petitioner's Fourth Amendment rights.

Petitioner was free on bail after being indicted for violation of the narcotics law. The incriminating statements were made in the

automobile of a confederate who, unknown to the petitioner, had agreed to let narcotics agents install a radio transmitter in the vehicle. The statements were overheard by an agent and were admitted in evidence over the objections of petitioner. The court of appeals affirmed the conviction.

The Supreme Court reversed, and in so doing stressed its decision of Spano v. New York, 360 U.S. 315 (1959), wherein a state court conviction was overturned because of the admission of a confession obtained after the defendant's indictment. Four concurring Justices had pointed out in Spano that "the Constitution required reversal of the conviction upon the sole and specific ground that the confession had been deliberately elicited by the police after the defendant had been indicted, and therefore at a time when he was clearly entitled to a lawyer's help." In the present case, the Court felt that the use of the incriminating statements denied petitioner the basic protection of the Sixth Amendment "when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." The Court stressed the fact that it was not ruling on the propriety of continuing surveillance of petitioner while he was free on bail, but only that his own incriminating statements, obtained under these circumstances, could not be used against him.

In Escobedo v. Illinois, 378 U.S. 478 (1964), the failure to honor Escobedo's request to consult

with his lawyer during the course of an investigation was held to be a denial of the assistance of counsel guaranteed by the Sixth and Fourteenth Amendments.

When Escobedo was interrogated by the police about the murder of his brother-in-law the police refused both his repeated requests to confer with his attorney and his attorney's attempts to see him. He admitted implication in the murder, was convicted, and the Illinois Supreme Court affirmed the admission of his statement.

The Supreme Court reversed and remanded, holding that it made no difference that the interrogation was conducted before Escobedo was formally indicted. It was the Court's view that when Escobedo requested, and was denied, an opportunity to consult with his lawyer, the investigation had ceased to be a general investigation of "an unsolved crime." The Court pointed out that the police had not informed him of his absolute right to remain silent, and declared that the "guiding hand of counsel" was essential to advise him of his rights.

In sum, the Court held that when the process of criminal law enforcement shifts from investigatory to accusatory, when its focus is on the accused and its purpose is to elicit a confession, our adversary system begins to operate and the accused must be permitted to consult his lawyer.

As a predicate for discussing whether or not these cases have any applicability to the

income tax area, an outline of the general investigative procedures of the Internal Revenue Service is in order.

The first contact with a taxpayer is often made by an Internal Revenue Agent whose duties involve the auditing of returns to determine the correct tax liability. If he finds indications of fraud, he refers the matter to his superiors who, if the facts justify such action, contact the Intelligence Division. A special agent may be assigned to look into the matter. He may informally interview the taxpayer (on a voluntary basis), contact third parties, and examine records. There may be other contacts with the taxpayer. The taxpayer is always free to consult or call in his attorney.

If the subsequent investigation develops evidence to warrant an Intelligence Division finding that a crime was probably committed and that the taxpayer probably committed it, the taxpayer is usually afforded the opportunity to appear with his attorney at a formal conference. Having completed his investigation, a special agent submits a report wherein he analyzes available data and makes a recommendation. If he has recommended prosecution and the Assistant Regional Commissioner (Intelligence) agrees, the matter is forwarded to one of our Regional Counsel.

At this point the case is accorded its first plenary legal review to determine if the evidence is sufficient to establish guilt beyond

a reasonable doubt and whether there is a reasonable probability of conviction. The taxpayer is usually offered a conference, whereat he is apprised of his rights under the Fifth and Sixth Amendments, advised of the Intelligence Division recommendation and the general procedure for reviewing criminal tax cases, and afforded the opportunity to make a statement.

If Regional Counsel concludes that the case should be prosecuted he makes an appropriate recommendation and forwards it to the Department of Justice. Thereafter, until final disposition of the criminal case, the Internal Revenue Service generally takes no further investigatory action except with the approval of the Department of Justice.

For further information as to the aforestated investigative and review procedures see Kostelanetz and Bender, Criminal Aspects of Tax Fraud Cases (August 1957); Balter, Tax Fraud and Evasion (3rd Ed., 1963); Schmidt, Legal and Accounting Handbook of Federal Tax Fraud (1963).

With this background, it becomes clear that Massiah and Escobedo have no across-the-board applicability in the area of criminal income tax investigations.

In view of the fact that the incriminating statements in Massiah were secured after indictment, that decision should have virtually no effect on the investigative techniques of our agents in the income tax area. In contrast to

the factual setting of Massiah, it is extremely unlikely that a special agent in an income tax investigation will be confronted with a situation where one member of a criminal conspiracy has been indicted and thereafter he must perform further investigation to develop evidence relative to unknown individuals.

In regard to Escobedo, we note that the Court, in determining that Escobedo's Constitutional rights were violated, commented:

> "The interrogation here was conducted before petitioner was formally indicted. But in the context of this case, that fact should make no difference. * * * It would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation, the authorities had secured a formal indictment. Petitioner had, for all practical purposes, already been charged with murder." (Emphasis added.) (pp. 485, 486.)

In reversing the conviction, the Court stated:

> "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogation that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the

> police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution * * *." (Pp. 490-491.)

The Supreme Court thus predicated its decision upon the presence of certain specific circumstances. Our reaction to these factors is that: (1) the circumstance of a known crime needing only the perpetrator's identity is simply not present in tax investigations; (2) the accusatory stage is reached in a criminal tax case only at the moment of arrest or upon the return of an indictment or filing of an information; (3) a taxpayer during the course of an inquiry into his tax affairs is not, barring an arrest, physically within the power of the special agent, nor is he, even if interrogated under the authority of a summons, inevitably under coercive pressure unless he knows of his right to remain silent or to have the assistance of counsel; and (4) a request to consult with an attorney is never denied by the Internal Revenue Service--to the contrary, and although there is no requirement to do so, a taxpayer is specifically advised at various stages during the processing of a criminal tax case of such right.

Undoubtedly the Escobedo and Massiah decisions may cause some disagreement both as to their precise scope and their effect on present criminal investigatory procedures. See 78 Harv. L. Rev.

217 (1964); 26 U. Pitt. L. Rev. 151 (October 1964); 33 U. Cin. L. Rev. 523 (Fall 1964); 14 DePaul L. Rev. 187 (Autumn-Winter 1964); 3 Duquesne U. L. Rev. 102 (Fall 1964); 48 Marq. L. Rev. 247 (Fall 1964); 38 So. Calif. L. Rev. 156 (1965); 9 St. Louis U. L. J. 281 (Winter 1964).

In sum, and in view of the investigative procedures described herein, we do not believe that the decisions are applicable in the income tax area. Accordingly, our procedures have not been changed nor do we expect to encounter any administrative difficulty in applying the rationale of said cases.

Inasmuch as the manuals used by the Internal Revenue Service are for intra-agency use only and are not available for public perusal we regret that we are unable to furnish specific citations thereto. However, we have referenced for your consideration several books wherein is discussed the role of a special agent in criminal tax investigations.

It is hoped that the foregoing will be of assistance.

Very truly yours,

Mitchell Rogovin

MITCHELL ROGOVIN
Chief Counsel

We would be interested in receiving a copy of your law review comments

U.S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

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MAY 27 1965

Mr. Duane W. Krohnke
Office of the Editor
The University of Chicago Law Review
Chicago 37, Illinois

In re: Application of Massiah and Escobedo to Income Tax Investigations

Dear Mr. Krohnke:

This replies to your May 10 request for elaboration on our statement that "although there is no requirement to do so, a taxpayer is specifically advised at various stages during the processing of a criminal (income) tax case of such right (to counsel)."

Numerous cases support the proposition that there is no duty resting upon an investigating special agent to warn a taxpayer that he does not have to testify against himself or to give any information that might be used against him, and the relevant inquiry is limited to whether the information has been understandingly and willingly given. United States v. Frank, 245 F.2d 284 (3rd Cir. 1957) cert. den. 355 U.S. 819; Hanson v. United States, 186 F.2d 61 (8th Cir. 1950); Turner v. United States, 222 F.2d 926 (4th Cir. 1955) cert. den. 350 U.S. 831; Scanlon v. United States, 223 F.2d 382 (1st Cir. 1955); Lloyd v. United States, 226 F.2d 9 (5th Cir. 1955); United States v. Sclafani, 265 F.2d 408 (2nd Cir. 1959) cert. den. 360 U.S. 918.

The latest decision so holding is United States v. Spomar, 339 F.2d 941 (7th Cir. 1964), cert. den. ___ U.S. ___ (1965). This case is of particular importance in that the court rejected the defendant's argument that information, even though voluntarily given, could not be introduced into evidence against him because he had no knowledge of his constitutional right to refuse to furnish such information. Defendant contended that the mere lack of knowledge of his constitutional rights was enough to vitiate the voluntary surrender of his records. In denying such assertion the court indicated that to hold otherwise would bind the Government by defendant's subjective state of mind which is not subject to proof, and would stand for the untenable proposition that one who has no duty to advise a taxpayer of his constitutional rights may nevertheless be held responsible for taxpayer's ignorance of such rights. This case was decided six months after the Escobedo decision. The Seventh Circuit apparently did not consider that the factual setting before it fell within the purview of Escobedo.

The Spomar holding is that Escobedo does not require a special agent to voluntarily advise a taxpayer of his Fifth Amendment right against self-incrimination. The Spomar rationale would similarly support the proposition that, despite the Supreme Court's holding in Escobedo that a Sixth Amendment "right to counsel" exists under certain circumstances during an investigation, an agent is under no duty to voluntarily advise a taxpayer of it.

Irrespective of this interpretation of Spomar, it is the general practice of the Intelligence Division that a taxpayer be advised in criminal income tax cases of his right to counsel when offered the opportunity to attend an interview with officials of that Division at the conclusion of the investigation. Similarly, he is orally advised of such right when meeting with representatives of Regional Counsel's office. This practice is, of course, predicated solely upon a recognition of the administrative desirability to apprise an individual of his right to counsel as contrasted with any legal requirement to do so. Obviously, under certain circumstances (e.g., where the taxpayer is known to have retained counsel or is himself an attorney) explicit advice of right to counsel may be inappropriate.

Regarding your proposed Law Review comment, we have no objection to your quoting from, or referring to, correspondence received from this office.

It is hoped that the foregoing will be of assistance.

Very truly yours,

MITCHELL ROGOVIN
Chief Counsel

EXHIBITS IN EVIDENCE

Exhibit Number	Pages of Reporter's Transcript (R.T.		
	Identified	Offered	Received
1	35	36	36
2	44	44	44
3	70	70	70
4	78	79	79
5	81	295	295
6	120	122	122
7	122	295	295
8	466	467	467
9	466	467	467